

MICHIGAN SUPREME COURT

PUBLIC HEARING
January 25, 2012

CHIEF JUSTICE YOUNG: Good morning and Happy New Year to those of you who haven't been here yet this year. This is our regularly scheduled public administrative agenda hearing time. We have a number of administrative items before us, but we only have speakers that want to address one item which is Item 2 on our published agenda which is number 2010-15 which concerns whether to adopt the proposed amendment of court rule 6.500 to clarify that trial counsel would be required to make a defendant's file available to an appellate lawyer, and it would also require the trial counsel to retain the file for at least five years consistent with the professional rule 1.15(b)(2). We have two speakers. The first being Ms. Liisa Speaker. Speaker speaker.

ITEM 2: 2010-15 - MCR 6.005

MS. SPEAKER: Good morning your honors. All appellate attorneys - by the way I'm here on behalf of the Appellate Practice Section as the Chair of that Section. All appellate attorneys face problems obtaining trial counsel's file, but that problem is exacerbated in criminal cases which this rule affects because of the passage of time and because of the important liberty interest at stake with the case. So we ask this Court to seriously consider adopting this proposal. And that's all I have unless you have questions.

CHIEF JUSTICE YOUNG: Well, that had the benefit of concision. Thank you very much. Meredith Krause.

MS. KRAUSE: Good morning Chief Justice and Justices of the Court. May it please the Court. My name is Meredith Krause and I'm the pre-screening attorney at the State Appellate Defender Office. And, again, I'm here today on - in support of 6.005(h), the proposed amendment. As part of my duties as a pre-screening attorney, I attempt to get discovery in all of our trial-based conviction cases that - for which our office is appointed. And, of course, our office believes that this information is vital. It's the only way that we can tell whether or not there was a *Brady* violation, whether there was ineffective assistance of counsel, if there's any newly discovered or any other non-record

error at trial. And the primary means through which I try to get this discovery is through the trial attorneys. They're ethically obligated already under Michigan court - excuse me - Michigan Rules of Professional Conduct 1.15 and 1.16. They're to retain the materials for a period of five years and provide them to appellate counsel, but, unfortunately, the ethical rules - or the Michigan Rules of Professional Conduct just simply aren't enough in this case. It's not happening. The attorneys aren't doing this. They either don't keep their file or many of our requests simply go unanswered entirely. And because there's no court rule that currently addresses this issue, we're left to seek the discovery in another - other means - through a different channel. And the other channels often prove completely inadequate. It is very rare for me to get a complete discovery pack from an incarcerated client - either they're not allowed to keep the materials in the facilities or the materials get lost if they get transferred. I also make many requests under the Freedom of Information Act directly to police departments and law departments in different cities, but many of these cities and police departments are so overwhelmed by the number of requests that they're getting they simply don't answer those requests either or we may get a response and vital information that we will need is redacted from the material. Prosecutors have also been helpful in some situations in getting this material, but, again, that's placing a heavy burden on - both the financial and time consuming burden on those offices when they've already supplied the information once. All of these options - all of these other options are time consuming and often fruitless. And as you know, we have a very short time period - a 56-day window - for filing, and attempting to get the discovery in any other means - or any other channel except through the trial attorney really reduces - greatly reduces the time that we have to thoroughly review the discovery and then prepare an adequate motion. And for this reason I ask that you adopt this proposal.

CHIEF JUSTICE YOUNG: Let me ask you a question. One of the comments suggest that they have a policy of declining such requests on the grounds of practicality and expense of copying the file materials. Do you have a reaction to that - that concern?

MS. KRAUSE: And I believe your honor if I may just to make sure that I understand the question, it's the trial attorney that -

CHIEF JUSTICE YOUNG: Yes.

MS. KRAUSE: that's denying the request.

CHIEF JUSTICE YOUNG: Right. On those grounds.

MS. KRAUSE: I believe that with today's technology, with the ability to store this material in an electronic format in many cases and our office at least allows them to either email it to us or we'll come pick it up - we will make the copies, we'll take on the expense. You know there really isn't a great deal of expense placed on the trial attorney.

CHIEF JUSTICE YOUNG: Now are you prepared to allow somebody to come and pick up one of your files and copy them?

MS. KRAUSE: I have done that in many cases that we've had, and -

CHIEF JUSTICE YOUNG: Somebody who's not associated with your office.

MS. KRAUSE: If they were appointed to the case, we would generally provide them with a copy. We would be able to do that because we -

CHIEF JUSTICE YOUNG: You would provide them with it.

MS. KRAUSE: Yes.

CHIEF JUSTICE YOUNG: Well, I gather that Mr. McMorrow has a very small office and doesn't have a great deal of capacity.

MS. KRAUSE: And in that case we would certainly take on reasonable expenses. If he were to copy those on this own, we would pay for those expenses when we ask for the material.

CHIEF JUSTICE YOUNG: You're saying this could be worked out.

MS. KRAUSE: Excuse me, I'm sorry?

CHIEF JUSTICE YOUNG: You're saying this can be worked out counsel to counsel.

MS. KRAUSE: Yes, your honor I do believe so.

CHIEF JUSTICE YOUNG: Thank you.

MS. KRAUSE: Thank you.

CHIEF JUSTICE YOUNG: I believe that concludes all of the persons who have comments on today's administrative agenda. That being the case we're adjourned. Thank you very much.